

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Yandell McKenny,)	C/A No. 4:08-3705-RBH-TER
)	
Plaintiff,)	
)	
vs.)	
)	
Dr. Moore,)	Report and Recommendation
)	
Defendant.)	

The Plaintiff, Yandell McKenny (Plaintiff), proceeding *pro se*, brings this action pursuant to 42 U.S.C. § 1983.¹ Plaintiff is an inmate at Kirkland Correctional Institution (KCI), a facility of the South Carolina Department of Corrections (SCDC), and files this action *in forma pauperis* under 28 U.S.C. § 1915. The complaint names as the sole Defendant a treating physician at KCI. The complaint should be dismissed for failure to state a claim upon which relief may be granted.

Pro Se and In Forma Pauperis Review

Under established local procedure in this judicial district, a careful review has been made of the *pro se* complaint pursuant to the procedural provisions of 28 U.S.C. § 1915; 28 U.S.C. § 1915A; and the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996). This review has been conducted in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25 (1989); *Haines v. Kerner*, 404 U.S. 519 (1972); *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995) (*en banc*); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983).

¹ Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Rule 73.02(B)(2)(d), D.S.C., the undersigned is authorized to review such complaints for relief and submit findings and recommendations to the District Court.

The complaint herein has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action “fails to state a claim on which relief may be granted” or is “frivolous or malicious.” § 1915(e)(2)(B)(i), (ii). A finding of frivolity can be made where the complaint “lacks an arguable basis either in law or in fact.” *Denton v. Hernandez*, 504 U.S. at 31. Hence, under § 1915(e)(2)(B), a claim based on a meritless legal theory may be dismissed *sua sponte*. *Neitzke v. Williams*, 490 U.S. 319 (1989); *Allison v. Kyle*, 66 F.3d 71 (5th Cir. 1995).

This Court is required to liberally construe *pro se* documents, *Estelle v. Gamble*, 429 U.S. 97 (1976), holding them to a less stringent standard than those drafted by attorneys, *Hughes v. Rowe*, 449 U.S. 9 (1980) (*per curiam*). Even under this less stringent standard, however, the *pro se* complaint is subject to summary dismissal. The mandated liberal construction afforded to *pro se* pleadings means that if the Court can reasonably read the pleadings to state a valid claim on which the Plaintiff could prevail, it should do so, but a district court may not rewrite a petition to include claims that were never presented, *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999), construct the Plaintiff's legal arguments for him, *Small v. Endicott*, 998 F.2d 411, 417-18 (7th Cir. 1993), or “conjure up questions never squarely presented” to the Court, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985). The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep’t of Soc. Servs.*, 901 F.2d 387, (4th Cir. 1990).

Background

Plaintiff alleges that Defendant Moore, a physician at KCI, has been negligent and has shown a disregard for Plaintiff's personal safety. Plaintiff indicates that he is allergic to carrots and tomatoes. Plaintiff wrote to Defendant Moore about Plaintiff's food allergies and was allegedly told to "pick out whatever [Plaintiff] was allergic to or just not to eat." Plaintiff claims he filed a grievance regarding the instant allegations. Plaintiff also discussed his dietary concerns with the KCI Warden and wrote the KCI Chaplain, but has received no special or alternate diet to date. Thus, Plaintiff appears to indicate that his attempts at administrative exhaustion have been futile. Plaintiff seeks injunctive relief and monetary damages for his allegedly improper diet.

Discussion

With respect to medical care, a prisoner in a § 1983 case "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). In the instant complaint, Plaintiff claims that he is allergic to carrots and tomatoes and that Defendant Moore has been deliberately indifferent to Plaintiff's health and safety by refusing to provide Plaintiff with a special diet. However, Plaintiff provides no factual information to indicate that his food allergies constitute a serious medical condition. Thus, as an initial matter, Plaintiff fails to establish a serious medical need, which is required to state a cognizable claim of deliberate indifference. *See Harrison v. Ash*, 539 F.3d 510, 518 (6th Cir. 2008).

In addition, while the provision of medical care by prison or jail officials is not discretionary, the type and amount of medical treatment is discretionary. *See Brown v. Thompson*, 868 F. Supp. 326, 329, n. 2 (S.D. Ga. 1994)(collecting cases). Further, although the Constitution requires that prisoners be provided with a certain minimum level of medical treatment, "it does not guarantee to

a prisoner the treatment of his choice." *Jackson v. Fair*, 846 F.2d 811, 817 (1st Cir. 1988). The instant complaint indicates that Defendant Moore told the Plaintiff to remove the offensive foods from his meals or to refrain from eating.² Thus, the Plaintiff admits that the Defendant provided a response to Plaintiff's dietary complaints, however, Plaintiff is unsatisfied with the Defendant's medical advice. As Plaintiff clearly received a recommendation from Defendant Moore regarding Plaintiff's alleged dietary restrictions, Plaintiff fails to show deliberate indifference on the part of this Defendant.

In as much as the Plaintiff is claiming negligence or incorrect medical treatment, such claims are not actionable under 42 U.S.C. § 1983. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Thus, a § 1983 action may not be based solely on a violation of state law or on a state tort. *Clark v. Link*, 855 F.2d 156, 161 (4th Cir. 1988). The law is well settled that negligence, in general, is not actionable under 42 U.S.C. § 1983. *See Daniels v. Williams*, 474 U.S. 327, 328-336 & n. 3 (1986); *Davidson v. Cannon*, 474 U.S. 344, 345-348 (1986); *Pink v. Lester*, 52 F.3d 73 (4th Cir. 1995) (*Daniels* bars an action under § 1983 for negligent conduct); *Ruefly v. Landon*, 825 F.2d 792, 793-794 (4th Cir. 1987). Similarly, medical malpractice, a state law tort, is not actionable under 42 U.S.C. § 1983. *Estelle v. Gamble*, 429 U.S. at 106 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner"). Thus, negligence and medical malpractice are not constitutional violations and do not

² It should be noted that prisons are not required to serve a special diet if inmates can voluntarily refrain from eating offensive foods and maintain an adequate diet. *Abernathy v. Cunningham*, 393 F.2d 775, 778 (4th Cir. 1968).

state a claim under § 1983. As Plaintiff has failed to state a claim upon which relief may be granted, this case is subject to summary dismissal. 28 U.S.C. § 1915(e)(2)(B)(ii).³

Recommendation

____ Accordingly, it is recommended that the District Court dismiss the complaint in the above-captioned case *without prejudice* and without issuance of service of process. *See Denton v. Hernandez*, 504 U.S. at 31; *Neitzke v. Williams*, 490 U.S. at 324-25; *Todd v. Baskerville* 712 F.2d at 74. Plaintiff's attention is directed to the important notice on the next page.

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

December 18, 2008
Florence, South Carolina

³ The allegations in the complaint are limited to carrots and tomatoes and contains no allegations as to the dietary sufficiency of his meals.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Court Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. In the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must “only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005).

Specific written objections must be filed within ten (10) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The time calculation of this ten-day period excludes weekends and holidays and provides for an additional three (3) days for filing by mail. Fed. R. Civ. P. 6(a) & (e). Filing by mail pursuant to Fed. R. Civ. P. 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
P. O. Box 2317
Florence, South Carolina 29503

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985).